RSA 40/2001
BEFORE

THE HON'BLE MR JUSTICE BP KATAKEY
JUDGMENT AND ORDER (ORAL)

This appeal by the defendants in Title Suit No. 6/1997 is directed against the judgment and decree dated 3.1.2001 passed by the learned District Judge, Darrang at Mongoldoi in Title Appeal No. 4/1999 dismissing the appeal and affirming the judgment and decree dated 6.8.1999 passed by the learned Civil Judge, (Senior Division), Darrang, Mongoldoi in Title Suit No. 6/1997, whereby and whereunder the suit of the plaintiffs/respondents was decreed.

2. The respondents, as plaintiffs, instituted the aforesaid suit for declaration of right, title and interest in respect of the land covered by schedule 'Ka' and 'Kha', for recovery of the possession in respect of the land and house described in scheduled 'Ka', 'Kha' and 'Ga'. The whole basis of claiming right, title and interest is that Amulya Kuchuni, the owner of the plot of land measuring 9 bighas 8 lechas though initially executed a will the same was, however, subsequently revoked by a registered deed (Ext. 2) and thereafter gifted the same in favour of the plaintiffs by executing a registered deed of gift dated 20.12.1993 (Ext. 1). According to the plaintiffs, since the defendants denied the title and dispossessed them from the said property the suit had to be filed.

3. The said suit has been contested by the defendants by filing a joint written statement contending inter alia that the defendant No.1 was adopted by Amulya Kuchuni and as such he has right over the property. The cancellation of the will has also been denied in the written statement so also the execution of the gift deed. The plea of adverse possession was also taken in such written statement.

4. The learned trial court on the basis of the pleadings of the parties framed the following issues for decision :-

1. Whether there is any cause of action for the suit?
2. Whether the suit is learned by limitation?
3. Whether the suit is not maintainable in the present form?
4. Whether the plaintiffs have got their right, title and interest over the suit land?
5. Whether the defendant No. 1 to the adopted son of late Amulya Kuchuni as alleged in the written statement?
6. Whether the defendant No. 1 has acquired right, title and possession over the suit land by adverse possession?
7. Whether the will in favour of defendant No. 1 executed by Amulya Kuchuni was cancelled and the suit land was gifted to the plaintiffs by Amulya Kuchuni at the instance of the husband of the plaintiff?
8. Whether the plaintiffs are entitled to the decree as prayed for?
9. To what other relief or reliefs are the parties entitled to?

5. The learned trial court upon appreciation of the evidences on record has decreed the suit of the plaintiffs by holding that though initially the will was executed in favour of the defendant No. 1, the same was, however, cancelled by another registered deed of revocation being Ext. 2. The claim of the defendant No. 1 that he is the adopted son as well as the claim of adverse possession have also been rejected by the learned trial court. The suit of the plaintiff has been decreed declaring the right, title and interest and recovery of khas possession on the basis of the gift deed executed by Amulya Kuchuni in favour of the plaintiffs, the daughters of Amulya Kuchuni, which has been proved by Ext 1.

6. Being aggrieved, the defendant preferred Title Appeal No. 4/1999 before the learned first appellate court, which has been dismissed by the judgment and decree dated 3.1.2001 by affirming the judgment and decree passed by the learned trial court. Hence the present appeal.

7. The appeal has been admitted for hearing on the following substantial question of law:

1. Whether a gift deed can be proved by a person who not being present signed as witness without receiving acknowledgement from the executant?

8. I have heard Mr. Deka, learned counsel for the appellants/defendants and Mr. CKS Baruah, learned senior counsel appearing for the respondents/plaintiffs.

9. Mr. Deka, learned counsel for the appellants referring to the judgments passed by the learned trial court as well as the appellate court has submitted that as the respondents/plaintiffs claim the right, title and interest on the basis of the gift deed (Ext. 1), the same has to be proved as required under Section 68 of the Evidence Act, but the learned courts below without discussing the evidences of the witnesses namely, PW 4 and 5, the attesting witnesses, have held that the plaintiffs could derive title on the basis of such gift deed. It has further been submitted that the learned appellate court even did not discuss any evidence on record relating to the proof by gift deed (Ext. 1) as required under Section 68 of the Evidence Act.

10. Mr. Sarma Baruah, learned senior counsel on the other hand supporting the judgments and decrees passed by the learned courts below has submitted that though the learned first appellate court did not discuss the evidences on record in details, it appears from the judgment passed by the learned trial court that the plaintiffs could prove the due execution of the gift deed being Ext. 1 as required under Section 68 of the Evidence Act and hence the learned court below has rightly passed the decree in favour of the plaintiffs.

11. I have considered the submissions of the learned counsel and also perused the judgments and decrees passed by the learned courts below.

12. As noticed above, the suit of the plaintiffs is based on Ext. 1, the gift deed, which according to the plaintiffs was executed by Amulya Kuchuni. The plaintiffs' right, title and interest being based on the gift deed, which is required to be attested by the attesting witnesses for its due execution, has to be proved as required under Section 68 of the Evidence Act i.e. by examining at least one attesting witness capable of giving evidence. In the instant case, there were two attesting witnesses to the gift deed, namely PW 4 and 5. Neither the learned trial court nor the learned appellate court discussed the evidence of PW 4 and 5, who are the attesting witnesses to the said gift deed Ext. 1, in detail. The discussion of the evidences of those witnesses is necessary as the gift deed being the deed required to be attested under the law, its due execution can be proved only in the manner provided under Section 68 of the Indian Evidence Act. That apart, the learned first appellate court being the final court on fact is required to discuss the relevant evidences on record though while affirming the judgment and decree passed by the learned court it may not discuss all the evidences in details. The judgment and decree passed by the learned appellate court do not reveal discussion of any material evidence more particularly the evidence of PW 4 and 5, which are very much relevant for the purpose of determination as to whether the plaintiffs could prove the gift deed.

13. In view of the above, the judgment and decree passed by the first appellate court are set aside. The matter is remitted to the learned first app

ellate court to decide the appeal afresh on the basis of the evidences already on record, by deciding the question as to whether the plaintiffs could prove the due execution of the gift deed (Ext. 1) as required under Section 68 of the Evidence Act. Since the suit was instituted in the year 1997, the learned first appellate court is directed to decide the said appeal within a period of three months from the date of appearance of the parties.

14. The parties shall appear before the learned first appellate court i.e. the court of the learned Civil Judge, Darrang at Mongoldoi on 25.6.2010 for taking necessary orders from the said court.

15. The appeal is accordingly allowed to the extent indicated above. No cost.

16. The Registry is directed to send down the records forthwith by special messenger so as to reach the court of the learned Civil Judge, Darrang, Mongoldoi within two weeks from today.